

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Altura Concrete Corporation and George Patunas.
Case 22–CA–075740

November 19, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On January 30, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 57. Thereafter, the then Acting General Counsel filed an application for summary enforcement with the United States Court of Appeals for the Third Circuit.¹

At the time of the Decision and Order, the composition of the National Labor Relations Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we shall consider de novo the General Counsel's Motion for Default Judgment.

The General Counsel seeks a default judgment in this case pursuant to the terms of a bilateral informal settlement agreement. Upon a charge filed by employee George Patunas on March 2, 2012, the General Counsel issued the complaint on May 10, 2012, against Altura Concrete Corporation, the Respondent, alleging that the Respondent violated Section 8(a)(1) and (3) of the Act. The Respondent filed an answer.

Subsequently, the Respondent and Patunas entered into an informal settlement agreement, which was approved by the Regional Director for Region 22 on August 1, 2012. Among other things, the settlement agreement required the Respondent to: (1) post and mail to current and former employees signed copies of the Notice to Employees; (2) provide the Region with a list of the names and addresses of employees to whom the Notices

were mailed and provide written confirmation of the mailing; and (3) pay Patunas a specified amount of backpay and interest and pay a specified amount of contributions to the District Council of Ironworkers Benefit Fund on behalf of Patunas.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the complaint previously issued on May 10, 2012 in the instant case. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that the allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

On August 30, 2012, by regular mail and fax transmittal, the Regional Director for Region 22 notified the Respondent's counsel that the Respondent was in non-compliance as it had failed to send to the Regional Office (1) a signed and dated Notice to Employees along with a certification of posting; (2) a check payable to Patunas for the amount specified in the settlement agreement; and (3) a check payable to the District Council of Ironworkers Benefit Fund in the amount specified in the settlement agreement on behalf of Patunas. The letter stated that unless the Regional Office received a signed and dated Notice to Employees, as well as a certification of posting and checks for the specified amounts of backpay, interest, and benefit fund contributions by September 13, 2012, the Regional Director would revoke the agreement and reissue the complaint without further notice. The Respondent failed to comply.

¹ Although some actions in this proceeding were taken by the then Acting General Counsel, this case is being currently being litigated by the General Counsel. Therefore, all further references are to the General Counsel.

Accordingly, pursuant to the terms of the noncompliance provision of the settlement agreement, on December 17, 2012, the Regional Director reissued the complaint and the General Counsel filed a Motion for Default Judgment with the Board. On December 26, 2012, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with the terms of the settlement agreement by, among other things, failing to send to the Regional Office a signed and dated Notice to Employees along with a certification of posting; failing to remit the agreed-upon backpay and interest amount to Patunas; and failing to remit the agreed-upon benefit fund contribution amount to the District Council of Ironworkers Benefit Fund. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the reissued complaint are true.² Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Little Ferry, New Jersey (the Little Ferry facility), and has been a concrete contractor in the construction industry performing concrete services for commercial buildings, educational institutions and/or retail concerns throughout the state of New Jersey.

During the 12-month period preceding reissuance of the complaint, the Respondent purchased and received at its Little Ferry facility goods valued in excess of \$50,000 from firms located within the State of New Jersey, which in turn purchased those goods directly from outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 455, Ironworkers, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

² See *U-Bee, Ltd.*, 315 NLRB 667 (1994). Also pursuant to the noncompliance provisions, we find that the Respondent's answer to the original complaint has been withdrawn.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Phillip Miller, the Respondent's construction manager, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About February 29, 2012, the Respondent, by its Construction Manager Phillip Miller, discharged its employee, George Patunas.

The Respondent engaged in the conduct described above because Patunas assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) by discharging George Patunas we shall order the Respondent to make Patunas whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action against him.

In this regard, we find that the backpay due Patunas should not be limited to the amount specified in the settlement agreement. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an Order providing a full remedy for the violations found as is customary to remedy such violations." Thus, under this language, it is appropriate to provide the "customary" remedies, including reinstatement, full backpay and benefits, expungement of the Respondent's personnel records, and notice posting.³

The backpay due Patunas shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

³ See *L. J. Logistics, Inc.*, 339 NLRB 729, 730-731 (2003).

Additionally, in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we shall order the Respondent to compensate Patunas for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

We shall also order the Respondent to offer Patunas full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall be required to remove from its files and records all references to Patunas' unlawful discharge, and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Altura Concrete Corporation, Little Ferry, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against employees for supporting Local 455, Ironworkers, or any other union.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer George Patunas full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make George Patunas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
 - (c) Compensate George Patunas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.
 - (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of George Patunas, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.
 - (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Little Ferry, New Jersey facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 29, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 19, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees for supporting Local 455, Ironworkers, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer George Patunas full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make George Patunas whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate George Patunas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of George Patunas, and WE WILL within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

ALTURA CONCRETE CORPORATION

The Board's decision can be found at www.nlrb.gov/case/22-CA-075740 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

